IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-656

INTERNATIONAL ASSOCIATION OF MACHINISTS, AND AEROSPACE WORKERS, AFL-CIO,
Petitioner.

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND UNITED AIRLINES, INC.,
Respondents.

REPLY OF PETITIONER TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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CASES CITED.

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ARGUMENT.

This case was tried on the theory that seniority systems which perpetuate an employer's discriminatory employment practices are tainted, unprotected by § 703(h) of the Act, and can be modified.[1] Our appeal contended that IAM's bona fide job classification seniority was immunized by § 703(h) and was

1. In its brief the EEOC erroneously describes the decree as a "consent" decree. IAM never consented to the decree which had been agreed to by the other parties. Additionally, our appeal was not limited to the issue of abuse of discretion but concerned itself with the broader issue of whether any change in IAM's seniority system was justified.

improperly changed to company seniority. In its opposition to our petition, the EEOC suggests that since IAM's seniority was modified only in regard to layoff and recall, such modification does not violate *International Brotherhood of Teamsters* v. *United States*, 431 U. S. 324 (1977). This theory was expressly rejected by the Court in *TWA* v. *Hardison*, 432 U. S. 63, 80 (1977):

> "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in those contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed upon seniority system must give way when necessary to accommodate religious observances."

In reversing, the Court held that the

> "Court of Appeals' conclusion that TWA was not limited by the terms of the seniority system was in substance nothing more than a ruling that operation of the seniority system was itself an unlawful employment practice even though no discriminatory practice had been shown. That ruling is plainly inconsistent with the dictates of § 703(h), both on its face and as interpreted in the recent decisions of this Court." *Id.* at 82.

The Court then emphasizes that

> "*Franks* v. *Bowman Transportation Company* is not to the contrary. In *Franks* we held that 'once an illegal discriminatory practice occurring after the effective date of the Act is proved' . . . does not bar an award of retroactive seniority to victims of the discriminatory practice.' Here the suggested exception to the TWA-IAM seniority system would not be remedial; the operation of the seniority system itself is said to violate Title VII. In such circumstances, § 703(h) unequivocally mandates that there is no statutory violation in the absence of a showing of discriminatory purpose." *Id.*, n. 13. (Citations omitted.)

The situation here is identical: the court's exception to IAM's bona fide seniority system was "not remedial", nor justified

by *Bowman*. The Court of Appeals' reliance on *Bowman* to change company seniority for all employees irrespective of proof of individual discrimination, or whether the discrimination was pre or post Act, results from its incorrect reading of *Bowman*, which contemplates only individual rightful place adjustments and not a modification of the seniority system which affects all employees. The EEOC's argument that there is a different evidentiary burden only because the seniority change was limited to layoff and recall is not justified by *Teamsters*. The principle set forth in *Teamsters* is applicable irrespective for what relief is sought.

Our petition is not premature because immediately after the decision of the Court of Appeals, the EEOC and UAL filed a motion before the district court to amend the decree. The district court granted EEOC's and UAL's joint motion and amended the decree to provide that all employees hired before July 2, 1965 would have a company seniority date of July 2, 1965 irrespective of when they were actually hired. Thus employees who under IAM's bona fide seniority system had a pre July 1, 1965 date were deprived of their earned seniority and were given the arbitrary date of July 2, 1965. IAM filed an opposition to the proposed order (Appendix 1-3, herein)[2] in which it contended that the court was required to follow the express language of *Teamsters* and to ignore the Seventh Circuit's "gloss" by amending the decree to eliminate court imposed company seniority, restore IAM's bona fide classification seniority, and to ignore the court's conclusionary presumption that a non-applicant's current willingness to transfer is evidence of an unlawfully thwarted past desire. Thus, Judge Will had a clear opportunity to amend his decree to conform to *Teamsters* but instead chose to regard the Court of Appeals' "gloss" as justification for changing IAM's

2. After being orally informed by the Solicitor General of his planned brief prior to its filing, we advised him that because of the opposition we filed in the district court, Judge Will was well aware of our contention that *Teamsters* dictated a course totally rejected by and irreconcilable with the Court of Appeals' decision.

seniority system.[3] To expect any district judge to conform both to *Teamsters* and the Seventh Circuit's gloss is to expect the impossible.

The EEOC erroneously reads the Seventh Circuit's order as a specific mandate to Judge Will requiring him to amend the decree to conform to *Teamsters*. All the Seventh Circuit did was to note that Section XIII of the decree provided an avenue for the parties to file a motion to amend the decree. The caveat was that any amendment had to be consistent both with *Teamsters* and the "gloss".

The Seventh Circuit justifies its refusal to follow *Teamsters* by suggesting that this is a unique case. There is nothing unique, nor any peculiar facts in this case; it is but a standard case, typical of all other EEOC pattern or practice discrimination cases.[4] It is clear since all of the cases relied upon by the Court of Appeals were either overruled or distinguished in *Teamsters*,[5] that labeling the case "unique" or commenting that it involves a mistake of law which is *sui generis* only camouflages the real intent of the court to disregard the plain teaching of *Teamsters*.

It is signficant that other circuits when faced with *Teamsters* type cases vacated orders which were based on pre-*Teamsters* rationale. In *Myers* v. *Gilman Paper Corp.*, 556 F. 2d 758, 760 (5th Cir. 1977) the court of appeals had affirmed the district court's finding that the union's seniority system had to be

3. Since the Court of Appeals expressly approved of Judge Will's wholesale destruction of IAM seniority, it is hardly surprising that Judge Will regarded the option of fashioning another remedy "consistent both with *Teamsters* and with the gloss our opinion puts on the Supreme Court's opinion" as ample justification not to change company seniority back to bargained for job classification seniority.

4. It is atypical in the sense that it affects over 18,000 IAM representated employees.

5. *United States* v. *Navajo Freight Lines*, 552 F. 2d 1318 (9th Cir. 1975); *Robinson* v. *Lorillard Corp.*, 444 F. 2d 791 (4th Cir. 1971); *United States* v. *Bethlehem Steel Corp.*, 446 F. 2d 652 (2nd Cir. 1971); *Local 189 United Paper Workers* v. *United States*, 416 F. 2d 980 (5th Cir. 1960).

changed because of the employer's practices. After *Teamsters*, the Fifth Circuit granted a petition for rehearing and held:

> It is clear at least that judgments of the district court and this court cannot stand on the theory this case has proceeded on to date. Accordingly, we amend and modify our opinion to vacate and reverse the district court order finding the Unions liable. . . .[6]

The Sixth Circuit in *Alexander* v. *Machinists Aero Lodge 735*, 565 F. 2d 1364, 1379 (6th Cir. 1977) found the teachings of *Teamsters* clear:

> "Therefore we are obliged to hold that in light of *Teamsters*, the district court erroneously concluded that the defendants violated Title VII by utilizing a seniority system . . . that perpetuated pre-Act discrimination."

Because the lower court based its decision on pre-*Hardison* cases, the Third Circuit similarly held that "since the *Hardison* Court has enunciated legal standards that diverge from those utilized by Judge Gourley, the judgment of the district court in this case must be vacated." *Ward* v. *Allegheny Ludlum Steel Corp.*, ... F. 2d ....., 15 FEP 471, 474 (3rd Cir. 1978).

In conclusion, we submit that the filing of the petition was not premature,[7] that the Seventh Circuit's "gloss" was a refusal

6. In *U. S.* v. *East Texas Motor Systems, Inc.*, ... F. 2d ....., 16 FEP 163, 166 (5th Cir. 1977), the court, holding that neither Title VII or Executive Order 11246 justifies disturbing bona fide seniority, vacated seniority relief fashioned by the district courts.

Even a conciliation agreement cannot override bona fide seniority provisions absent a showing of discriminatory purpose, a seniority system is protected from attack under Title VII and "wholesale destruction of the system, authorized by the conciliation agreement, cannot be permitted." *Southbridge Plastics Div., W. R. Grace and Co. v. Rubber Workers Local 759*, ... F. 2d ....., 16 FEP 507 (5th Cir. 1978).

7. Lawyers speak a language of their own, often unrelated to the reality of life. Would any of 18,000 employees who have had their seniority improperly changed consider restoration of their seniority rights premature? Would any of the IAM represented employees who have been deprived of a better paying job or laid off because their contractual seniority had been destroyed believe that it is not a ripe time to restore their lawful seniority?

to follow *Teamsters*, and that the district court, reading the Seventh Circuit's decision as an affirmance of his decree, rejected petitioner's arguments that *Teamsters* prohibited any change in IAM's bona fide seniority system. As long as the Seventh Circuit "gloss" remains the law in this circuit, courts will be free to ignore *Teamsters*.

The principle before this Court is identical to that in *Nashville Gas Co.* v. *Saity*, ... U. S. ....., 46 LW 4026, 4029 (1977):

> The decision of the Court of Appeals . . . embodied generally the same line of reasoning as the Court of Appeals for the Fourth Circuit followed in its opinion in *General Electric*, 519 F. 2d 661 (1975). Since we rejected that line of reasoning in our opinion in *Gilbert, supra*, the judgment of the Court of Appeals with respect to petitioner's pay policies must be vacated.

In view of the refusal of the Court of Appeals to follow *Teamsters*, the petition for certiorari should be granted, the decision of the Court of Appeals vacated with specific directions to the district court to conform its decree to *Teamsters* by reinstating IAM's bona fide seniority system.

Respectfully submitted,

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APPENDIX.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff,* *vs.* UNITED AIR LINES, INC., et al., *Defendants.*	73 C 972

IAM'S OPPOSITION TO ORDER PROPOSED BY EEOC AND UNITED

On June 28, 1977 the United States Court of Appeals for the Seventh Circuit, issued its decision upon IAM's appeal from the decree entered by the court. The decision purported to evaluate the impact of the Supreme Court's recent decision in *International Brotherhood of Teamsters* v. *U. S.*, 45 LW 4506. Although generally affirming the decree, the decision contained language which specifically narrowed the decree's award of retroactive seniority.

On July 28, the Court of Appeals denied IAM's petition to vacate and remand or for rehearing, and issued a supplemental order stating in pertinent part "the district court is free to fashion another remedy as long as that remedy is consistent both with *Teamsters* generally and with the gloss our opinion puts on the Supreme Court's opinion." (Exhibit A, p. 2 attached). Accordingly, this court is duty bound to modify or amend its decree in conformity with this prescription. The order suggested jointly by United and the EEOC fails to do this.

By providing for the imposition of company seniority (Section (c)) the proposal directly violates *Teamsters*. That decision

expressly immunizes bargained for seniority systems even though they perpetuate pre-Act or post-Act discrimination or both and allows for only individual seniority adjustments, upon an individual evidentiary showing. The Seventh Circuit concedes this holding, referring to this immunization as the "passive operation of a bona fide seniority system which is perpetuating pre-Act and post-Act discrimination." Slip Opinion, note 17. Company seniority for post-Act pre-decree transferees to the job classification covered by this court's decree is explicitly precluded by footnote 17.

Section (b) of the EEOC-United proposed order similarly violates *Teamsters* in that it awards seniority earned in one classification for use as layoff protection in another classification. It therefore disrupts the bargained for IAM classification seniority system and does not constitute an individual *Franks* v. *Bowman* type seniority adjustment mandated by *Teamsters*. Moreover, it violates the express provision of footnote 17 which bars any grant of seniority to an individual who transfers from a non-IAM job to an IAM job post-Act and pre-decree.[1]

Further, application will produce strange results. An employee hired in 1955 and who transfers to a mechanic on January 1, 1966 would have a seniority date of July 2, 1965. An employee hired nine years later in 1964 and who transferred to mechanic on January 1, 1977 would have the same seniority date of July 2, 1965. The first employee would have 9 more years of total company seniority and 12 more years as a mechanic but would still end up with the same seniority as the junior employees. This result cannot be justified as awarding the most senior employee but results from trying to apply the July 2, 1965 standard to all employees.

In addition, for those who merely change classifications within IAM jobs, the Court of Appeals clearly imposes "union time"

1. Footnote 17 appears to limit the award of company seniority to post decree transferees who "overleap the evidentiary gap" required under *Franks* and *Teamsters* by electing to transfer post decree.

(i.e., that is total time in union classifications) as the measure of the seniority award. Thus, it is only with respect to employees with seniority stemming solely from IAM classifications that proposal (b) can apply according to the Court of Appeals.

In IAM's view, *Teamsters* precludes the amalgamation of IAM classifications into "union time" inasmuch as it constitutes a non specific, non *Franks* type change of a bona fide seniority system. However, pending IAM's petition for certiorari in this case, since the Court of Appeals ruling controls, proposal b must at least be limited to conform with the Court of Appeals' concept of "union time".

Section (a) does not conflict with the Court of Appeals since no post-Act adjustments affect these employees seniority standing and their total union time is identical to their post-Act "union time". Proposal (d) relates to no issue discussed or decided in *Teamsters* or the opinion of the Court of Appeals.

To summarize, IAM understands the *Teamsters'* decision and the Court of Appeals' decision to preclude imposition of company seniority for pre-Act time served or to post-Act pre-decree transferees to the IAM units. As to post decree transferees, the Court of Appeals departs from *Teamsters* in allowing company seniority to those who "overleap the evidentiary gap" by manifesting their present intention to transfer. And it further departs in creating "union time". Inasmuch as these departures must be followed as the present law in the Circuit, the order issuing from this court must reflect them. The EEOC and United proposal must be rejected and "Union" seniority and the limited application of company seniority to post decree transferees must be the terms of the order.

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